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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION

This Document Relates to:

ALL CONSUMER AND RESELLER ACTIONS

MDL 2672 CRB (JSC)

PLAINTIFFS' NOTICE OF MOTION, MOTION, AND MEMORANDUM IN SUPPORT OF PRELIMINARY APPROVAL OF THE CLASS ACTION AGREEMENT AND APPROVAL OF CLASS NOTICE

Hearing: July 26, 2016
Time: 8:00 a.m.
Courtroom: 6, 17th floor

The Honorable Charles R. Breyer

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NOTICE OF MOTION AND MOTION

TO THE ALL PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on July 26, 2016, at 8:00 a.m., or at such other date as may be agreed upon, in Courtroom 6 of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California, Lead Counsel and the Plaintiffs' Steering Committee, on behalf of a proposed Settlement Class of certain owners and lessees of Volkswagen and Audi branded 2.0-liter TDI vehicles defined in the Class Action Settlement, will and hereby do move the Court for an order granting preliminary approval of the Class Action Settlement, provisionally certifying the Class, directing notice to the Class, and scheduling a fairness hearing.

As discussed in the attached Memorandum and Points of Authorities, the Parties have reached an historic settlement that remediates past environmental harm, minimizes future environmental harm, and compensates consumers for their losses. Moreover, the proposed notice program, which includes direct mail notice and an extensive media outreach, is the best notice practicable under the circumstances. The proposed Settlement Class Representatives thus respectfully request that the Court grant preliminary approval, provisionally certify the Class, direct notice to the Class, and schedule a fairness hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

For six years, Volkswagen sold its Volkswagen and Audi branded TDI diesel vehicles in the U.S. with resounding success. These cars were marketed as fuel-efficient, safe, well-performing, and reliable cars, and in all these respects, they delivered. In one respect, they deceived. The Volkswagen and Audi TDI were also marketed as "clean diesels," while in fact they violated federal and state emissions rules. The more TDI owners drove, the more the environment was harmed.

When this deception was publicly disclosed on September 18, 2015, the owners and lessees alleged harm too, because the market value of their cars dropped. The mission of these resulting MDL proceedings, comprised of hundreds of consumer suits, and actions by the United

States Department of Justice ("DOJ") on behalf of the United States Environmental Protection Agency ("EPA"), the Federal Trade Commission ("FTC"), and the State of California by and through the California Air Resources Board ("CARB") and California's Office of the Attorney General, has been, as the Court has acknowledged and urged, to "get[] the polluting cars fixed or off the road" and to compensate Volkswagen's aggrieved customers. March 24, 2016, Status Conference Hr'g Tr. 8:20-21 (Dkt. 1384).

The proposed class action settlement (the "Settlement" or "Class Action Agreement"), and the related EPA/CARB and FTC agreements with Volkswagen, combine to accomplish this environmentally restorative goal in the speediest practicable manner, without the delays, uncertainties, and enforcement problems of protracted litigation. They do so in three ways, summarized here and described more fully in this brief and the Settlement:

1. Repairing the environmental harm by paying TDI owners and lessees to make their cars emissions compliant by choosing to have Volkswagen install, at its expense, EPA-approved emissions modifications as these become available;

2. Enabling TDI owners to recoup their lost vehicle value by selling back their operable cars, regardless of condition, to Volkswagen at September 2015 NADA Clean Trade (pre-"scandal") values, with a cash payment on top of this frozen-in-time, vehicle- specific value. Cars recovered by Volkswagen in this "buyback" program cannot be resold, anywhere in the world, unless they are fixed to EPA standards; and

3. Pursuant to Volkswagen's agreement with the DOJ, requiring Volkswagen to pay a total of $4.7 Billion, (on top of the $10.033 billion funding pool for the Buyback and Emissions Modification program) in environmental reparations, to be administered and enforced by the EPA.

This historic and extraordinary litigation resolving all 2.0-liter TDI claims against Volkswagen, has now reached a partial resolution[1] that represents the largest auto-related class action settlement in U.S. history. The settlement was achieved through an historic and

[1] Plaintiffs' unreleased claims include those concerning 3.0-liter vehicles and all claims against Robert Bosch, LLC, Robert Bosch GmbH, and Volkmar Denner.

extraordinary collaboration among private litigants, DOJ, EPA, CARB and FTC, all facilitated by the diligence of the Court and its specially appointed Settlement Master. The Settlement, in combination with the related and simultaneously-negotiated FTC Consent Order and DOJ Consent Decree (together, the "Settlements"), are valued at approximately $15 billion, resolve Class Members'[2] claims pertaining to Volkswagen and Audi 2.0-liter TDI vehicles ("Eligible Vehicles") against Volkswagen and honor consumer choice by providing owners and lessees with the options of either a "buyback" or "fix" of their vehicles, while also providing them additional compensation in the form of substantial restitution payments. The Settlements require Volkswagen to create a $10.033 billion Funding Pool, and also to pay an additional $4.7 billion to environmental remediation and zero emission technology initiatives, to ensure significant ecological mitigation and future environmental protection.[3]

The Settlement comes only nine months after news of Volkswagen's diesel scandal broke, and only five months after this Court appointed Lead Counsel and the Plaintiffs' Steering Committee ("PSC") (together, "Class Counsel"). However, the truncated time frame within which the Settlement was reached belies the Herculean efforts undertaken by Class Counsel and others, including defense counsel, counsel on behalf of multiple government entities, Settlement Master Mueller and his team, and the Court. Indeed, for the past five months, weekends and weekdays were synonymous and holidays did not exist, as every day that passed without a resolution was another day that the Eligible Vehicles were spewing excessive levels of harmful pollutants into the atmosphere. The hours worked by Class Counsel (and, indeed, by counsel for all settling parties) are more typical of a multi-year complex litigation than a multi-month litigation. While these intensive settlement efforts went on around the clock, the litigation did not

[2] Capitalized terms have the meaning ascribed to them in Section 2 of the Class Action Settlement.

[3] In addition, a consortium of Attorneys General have reached a related agreement to resolve their states' unfair and deceptive practice act claims against both Volkswagen and Porsche in exchange for (1) $1,100 for each 2.0- and 3.0-liter vehicle originally sold or leased in the participating states prior to September 18, 2015, (2) payment of $20,000,000 to the National Association of Attorneys General ("NAAG"), and (3) an injunction against future unfair and deceptive acts or practices. The Attorneys General settlement increases the total value of the Settlements to well over $15 billion.

halt—the PSC continued its brisk pace of factual investigation, document review and analysis, and continued to build the case against settling and non-settling Defendants alike. Class Counsel have, without question, fulfilled (and will continue to fulfill) their commitment to the Court to personally devote their own time, and the time and resources of their respective firms, towards the litigation and resolution of this case.

Plaintiffs are proud to present the Settlement to the Court and respectfully request its approval. For the reasons explained herein, pursuant to Rule 23 of the Federal Rules of Civil Procedure, this Court should enter an order preliminarily approving the Settlement, provisionally certifying the Settlement Class, directing notice of Settlement to the Class in the manner proposed herein, and setting a schedule for final approval of the Settlement.

II. BACKGROUND AND PROCEDURAL HISTORY

A. Factual Background

As alleged in the Consolidated Consumer Class Action Complaint (the "Complaint") (Dkt. 1230), this multidistrict litigation arises from Volkswagen's deliberate use of a Defeat Device, a secretly embedded software algorithm installed in its TDI "clean diesel" vehicles that was designed to cheat emissions tests and fool regulators into approving for sale and lease hundreds of thousands of non-compliant Eligible Vehicles. The Defeat Device engages emission controls to temporarily lower emissions when the TDI engines are being tested, and then deactivates the emission controls when the cars return to normal driving conditions. Volkswagen was able to obtain Certificates of Conformity ("COCs") from the EPA, and Executive Orders ("EOs") from CARB, only by using the Defeat Device, by misrepresenting the true levels of emissions from the Eligible Vehicles, and by concealing the use of the Defeat Device in its certification applications. With the Defeat Devices installed and the emissions controls deactivated during normal use, the Eligible Vehicles polluted at an alarming rate of up to forty times the legal limit. And yet, all the while, Volkswagen deceptively pitched itself—through an extensive, worldwide advertising campaign—as the world's foremost innovator of "clean" diesel technology to hundreds of thousands of consumers who paid a premium to purchase or lease what they believed to be "clean" diesel vehicles.

From 2009-2015, Volkswagen's Defeat Device scheme remained hidden, and the Eligible Vehicles were sold and leased at record numbers to Class Members. Even after road tests uncovered that the TDI engines were actually spewing up to 40 times the allowable limits of pollutants during normal road driving, Volkswagen continued to obfuscate the truth and mislead regulators and consumers for over a year. Finally, after running out of plausible excuses for the discrepancies in the test results, Volkswagen was forced to admit its fraudulent conduct to Congress, to regulators, and to consumers who purchased and leased vehicles equipped with so-called "clean" diesel engines.

B. Procedural History

On September 3, 2015, Volkswagen officials formally disclosed to EPA and CARB that it had installed Defeat Device software in the Eligible Vehicles. On September 18, 2015, the EPA issued a Notice of Violation of the Clean Air Act ("CAA") and CARB sent a letter advising that it had initiated an enforcement investigation of Volkswagen. In the months that followed, consumers filed over 500 class action lawsuits against Volkswagen across the United States, with 101 of those lawsuits filed in the state of California alone. Since Volkswagen's revelation of its scheme, DOJ filed a complaint at the request of the EPA for violations of the CAA, FTC filed a complaint for violations of the FTC Act, California and other state attorneys general announced investigations or filed lawsuits. Many other domestic and foreign government entities also launched criminal and civil investigations of Volkswagen and related individuals and entities around the world.

On December 8, 2015, the Judicial Panel on Multidistrict Litigation transferred all related federal actions (including over 500 putative class actions) to the Northern District of California for coordinated pretrial proceedings before this Court. Dkt. 1. On January 19, 2016, the Court appointed former FBI Director Robert S. Mueller as Settlement Master to attempt to facilitate a settlement between the parties. Dkt. 797. On January 21, 2016, the Court appointed Plaintiffs' Lead Counsel and the PSC. Dkt. 1084.

In the weeks and months that followed, a fully-deployed PSC worked tirelessly both to prosecute the civil cases on behalf of consumers and to work with Volkswagen, federal and state

agencies, and the Settlement Master to try to resolve some or all of the claims asserted in this litigation. Lead Counsel created more than a dozen PSC working groups to ensure that the prosecution and settlement tracks proceeded in parallel, and that the enormous amount of work that needed to be done in a very short period of time was done in the most organized and efficient manner possible. Those working groups focused simultaneously on both litigation and settlement tasks, including drafting the consolidated class complaints; serving, responding to, and reviewing voluminous discovery; analyzing economic damages (and retaining experts concerning those issues); reviewing Volkswagen's financial condition and ability to pay any settlement or judgment; assessing technical and engineering issues; coordinating with multiple federal and state governmental agencies as well as with plaintiffs in state court actions; and researching environmental issues, among others.

On February 22, 2016, Class Counsel filed a 719-page Consolidated Consumer Class Action Complaint asserting claims for fraud, breach of contract, and unjust enrichment, and for violations of The Racketeer Influenced and Corrupt Organizations Act ("RICO"), The Magnuson-Moss Warranty Act ("MMWA"), and all fifty States' consumer protection laws. Dkt. 1230. The length of, and detail in, the Complaint reflects the arduous process undertaken by Class Counsel in understanding the factual complexities of the alleged fraud, and researching and developing the various claims at issue and the remedies available to those who were harmed by Volkswagen's conduct.

Following the filing of the Complaint, Class Counsel served Volkswagen with extensive written discovery requests, including interrogatories, requests for production, and requests for admissions, and negotiated comprehensive expert, deposition, preservation, confidentiality, and ESI protocols. To date, Volkswagen has produced almost 12 million pages of documents, and Class Counsel have reviewed and analyzed approximately 70% of them through a massive, around the clock effort. That effort required the reviewing attorneys not only to understand the legal complexities of the dozens of claims Plaintiffs asserted, but also to master the difficulties and nuances involved when working with documents written in German. At the same time, Class Counsel responded to Volkswagen's discovery requests, producing documents from 174 named

Plaintiffs, in addition to compiling information to complete comprehensive fact sheets, which also included document requests, for each named Plaintiff.

Under the Settlement Master's guidance and supervision, Lead Counsel and a settlement working group of the PSC engaged in arm's-length settlement negotiations with Volkswagen in an effort to resolve some or all of the consumer claims brought by Plaintiffs. At the Court's direction, the settlement negotiations began from almost the moment the Court appointed the Settlement Master, Plaintiffs' Lead Counsel, and the PSC in January 2016. Since that time, settlement discussions have occurred on both coasts of the United States, in person and telephonically, without regard to holidays, weekends, or time zones. The negotiations have been extraordinarily intense and complex, particularly considering the timeframe and number of issues and parties involved, including attorney representatives from numerous governmental entities. The result of all these meetings and negotiations is an unprecedented trio of settlements with different emphases—including an outstanding Class Settlement for owners and lessees of 2.0-liter TDI vehicles—that converge to achieve a common restorative goal.

III. TERMS OF THE SETTLEMENT

A. The Class Definition

The Settlement Class consists of all persons (including individuals and entities) who, on September 18, 2015, were registered owners or lessees of a Volkswagen or Audi 2.0-liter TDI vehicle in the United States or its territories (an "Eligible Vehicle," defined more fully in the Class Action Agreement), or who, between September 18, 2015, and the end of the Claim Period, become a registered owner of an Eligible Vehicle. The following entities and individuals are excluded from the Class:

(1) Owners who acquired their Volkswagen or Audi 2.0-liter TDI vehicles after September 18, 2015, and transfer title before participating in the Settlement Program through a Buyback or an Approved Emissions Modification;

(2) Lessees of a Volkswagen or Audi 2.0-liter TDI vehicle that is leased from a leasing company other than VW Credit, Inc.;

(3) Owners whose Volkswagen or Audi 2.0-liter TDI vehicle (i) could not be driven

under the power of its own 2.0-liter TDI engine on June 28, 2016, or (ii) had a Branded Title of Assembled, Dismantled, Flood, Junk, Rebuilt, Reconstructed, or Salvage on September 18, 2015, and was acquired from a junkyard or salvage yard after September 18, 2015;

(4) Owners who sell or otherwise transfer ownership of their Volkswagen or Audi 2.0-liter TDI vehicle between June 28, 2016, and September 16, 2016 (the "Opt-Out Deadline"), inclusive of those dates;

(5) Volkswagen's officers, directors and employees; Volkswagen's affiliates and affiliates' officers, directors and employees; their distributors and distributors' officers, directors and employees; and Volkswagen Dealers and Volkswagen Dealers' officers and directors;

(6) Judicial officers and their immediate family members and associated court staff assigned to this case; and

(7) Persons or entities who or which timely and properly exclude themselves from the Class as provided in this Agreement.

B. Benefits to Class Members

Pursuant to the Settlement, Volkswagen will provide the following benefits to the Class Members:

(1) Creation of a Funding Pool of $10.033 billion ($10,033,000,000) from which funds will be drawn to compensate Class Members under the Buyback, Lease Termination and Restitution Payment programs, pursuant to the Class Action Settlement Program, as further detailed below;

(2) The provision of an Approved Emissions Modification for Class Members who do not wish to participate in the Buyback or Lease Termination programs, pursuant to the Class Action Settlement Program, as further detailed below;

(3) Payment of $2.7 billion into a Trust whose purpose is to support environmental programs throughout the country that will reduce NO_X in the atmosphere by an amount equal to or greater than the combined NO_X pollution caused by the cars that are the subject of the lawsuit; and

(4) The investment of $2 billion to create infrastructure for and promote public

awareness of zero emissions vehicles.

Class Members will be grouped into three different categories (Eligible Owners, Eligible Sellers, and Eligible Lessees) and compensated as follows:

(1) Eligible Owners will be offered the choice between (A) a Buyback and Owner Restitution, including substantial loan forgiveness if applicable, or (B) an Approved Emissions Modification and Owner Restitution.

(2) Eligible Lessees who retain an active lease of an Eligible Vehicle will be offered the choice between (A) a Lease Termination and Lessee Restitution or (B) an Approved Emissions Modification and Lessee Restitution.

(3) Eligible Lessees who return or have returned an Eligible Vehicle at the conclusion of the lease will be offered Lessee Restitution.

(4) Eligible Lessees who obtained ownership of their previously leased Eligible Vehicle after June 28, 2016 will be offered an Approved Emissions Modification and Lessee Restitution.

(5) Eligible Sellers will be offered Seller Restitution.

(6) Owners whose Eligible Vehicle was totaled and who consequently transferred title of their vehicle to an insurance company after the Opt-Out Deadline, but before the end of the Claim Period, will be offered Owner Restitution but not a Buyback.

The Buyback and Restitution Payment programs will be based on the September 2015 (prior to the disclosure of the existence of the Defeat Device) National Automobile Dealers Association ("NADA") Clean Trade In value of the Eligible Vehicle adjusted for options and mileage ("Vehicle Value"). The Vehicle Value will be fixed as of September 2015 such that the value of Eligible Vehicles will not depreciate throughout the entire settlement claim period. The restitution amounts for owners and lessees will be same regardless of whether they choose a Buyback/Lease Termination or an Approved Emissions Modification.

The following chart summarizes Class Member options and payments:

Category	Definition	Benefit Options	Restitution Payment
Eligible Owner (bought car on or before September 18, 2015)	Registered owner of an Eligible Vehicle at the time of Buyback or Approved Emissions Modification.	(1) Buyback Vehicle Value + Restitution Payment + Loan Forgiveness if applicable OR (if approved) (2) Emissions Modification Modification to your car to reduce emissions + Restitution Payment	20% of the Vehicle Value + $2,986.73 $5,100 minimum
Eligible Owner (bought car after September 18, 2015)	Registered owner of an Eligible Vehicle at the time of Buyback or Approved Emissions Modification.	(1) Buyback Vehicle Value + Restitution Payment OR (if approved) (2) Emissions Modification Modification to your car to reduce emissions + Restitution Payment	10% of the Vehicle Value + $1529 + a proportional share of any restitution not claimed by Eligible Sellers $2,550 minimum
Eligible Seller	Registered owner of an Eligible Vehicle on September 18, 2015, who transferred vehicle title after September 18, 2015, but before June 28, 2016.	Restitution Payment	10% of the Vehicle Value + $ 1,493.365 $2,550 minimum
Eligible Lessee (currently leases car)	Registered lessee of an Eligible Vehicle, with a lease issued by VW Credit, Inc., at the time of Early Lease Termination or Approved Emissions Modification.	(1) Lease Termination Early termination of the lease without penalty + Restitution Payment OR (if approved) (2) Emissions Modification Modification to your car to reduce emissions + Restitution Payment	10% of the Vehicle Value (adjusted for options but not mileage) + $1529
Eligible Lessee (formerly leased car)	Registered lessee of an Eligible Vehicle, with a lease issued by VW Credit, Inc., who returned the Eligible Vehicle at the end of the lease on or after September 18, 2015, or purchased the Eligible Vehicle after June 28, 2016.	Restitution Payment	10% of the Vehicle Value (adjusted for options but not mileage) + $1,529

Another extraordinary aspect of this resolution is its treatment of attorneys' fees. None of the settlement benefits for Class Members will be reduced to pay attorneys' fees or to reimburse

expenses of Class Counsel. Volkswagen will pay attorneys' fees and costs separately and in addition to the Settlement benefits to Class Members. Class Counsel have not yet conducted any substantive discussions regarding the payment of attorneys' fees with any defendants. Deferring the discussion of fees until after substantive settlement terms are agreed upon is a practice routinely approved by courts. *See In re NFL Players Concussion Injury Litig.*, 2016 WL 1552205, at *26 (3d Cir. Apr. 18, 2016), as amended (May 2, 2016). Class Members will have the opportunity to comment on or object to any fee petition under Fed. R. Civ. P. 23(h) prior to the award of attorneys' fees.

IV. THE SETTLEMENT MERITS PRELIMINARY APPROVAL

A. The Class Action Settlement Process

Pursuant to Federal Rule of Civil Procedure 23(e), class actions "may be settled, voluntarily dismissed, or compromised only with the court's approval." As a matter of "express public policy," federal courts favor and encourage settlements, particularly in class actions, where the costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (noting the "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned"); *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008) (same); *see also* 4 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* ("*Newberg*") §11:41 (4th ed. 2002) (same, collecting cases).

The *Manual for Complex Litigation (Fourth)* (2004) (the "*Manual*") describes the contemporary three-step procedure for approval of class action settlements: (1) preliminary approval of the proposed settlement; (2) dissemination of the notice of the settlement to class members, providing for, among other things, a period for potential objectors and dissenters to raise challenges to the settlement's reasonableness; and (3) a formal fairness and final settlement approval hearing. *Id.* at §21.63. The *Manual* characterizes the preliminary approval stage as an "initial evaluation" of the fairness of the proposed settlement made by the court on the basis of written submissions and informal presentations from the settlement parties. *Id*. at § 21.632. The proposed Settlement Class Representatives request that the Court grant preliminary approval of

the Settlement and authorize the dissemination of notice of the Settlement to Class Members. The Settlement Class Representatives further request that the Court appoint the undersigned Lead Counsel and the PSC as Class Counsel and the 2.0-liter TDI owners/lessees listed in Exhibit 1 to this Motion as the Settlement Class Representatives.

B. The Standard For Preliminary Approval

Rule 23 of the Federal Rules of Civil Procedure governs a district court's analysis of the fairness of a settlement of a class action. *See* Fed. R. Civ. P. 23(e). To approve a class action settlement, the Court must determine whether the settlement is "fundamentally fair, adequate and reasonable." *In re Rambus Inc. Derivative Litig.*, No. C–06–3515–JF, 2009 WL 166689, at *2 (N.D. Cal. Jan. 20, 2009) (citing Fed. R. Civ. P. 23(e)); *see also Mego Financial Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000); *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982)). Preliminary approval of a proposed settlement is the first step in making this determination.

If "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that the notice be given to the class members of a formal fairness hearing." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007); *see also In re Netflix Privacy Litig.*, No. 5:11-CV-00379 EJD, 2013 WL 1120801, at *4 (N.D. Cal. Mar. 18, 2013) (applying at preliminary approval a "presumption" of fairness to settlement that was "the product of non-collusive, arms' length negotiations conducted by capable and experienced counsel"). "The preliminary determination establishes an initial presumption of fairness." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1079–80 (citation omitted). "Although Rule 23 imposes strict procedural requirements on the approval of a class settlement, a district court's only role in reviewing the substance of that settlement is to ensure that it is 'fair, adequate, and free from collusion.'" *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012), *cert. denied*, 134 S.Ct. 8 (2013) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998)); *see also In re Hewlett-Packard Co. S'holder Derivative Litig.*, No. 3:12-CV-06003-CRB, 2015 WL

1153864 at *5 (N.D. Cal. Mar. 13, 2015) (granting preliminary approval of third amended settlement in derivative action that "appears to represent a fair, reasonable, and adequate resolution" of the claims).

When class counsel is experienced and supports the settlement, and the agreement was reached after arm's-length negotiations, courts should give a presumption of fairness to the settlement. *See Nobles v. MBNA Corp.*, No. C 06-3723 CRB, 2009 WL 1854965, at *6 (N.D. Cal. June 29, 2009); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981). Additionally, "[i]t is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003).

The Ninth Circuit has identified "the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement" as factors for determining whether a settlement is, in the final analysis, fair, reasonable, and adequate. *See Hanlon*, 150 F.3d at 1026. "The relative degree of importance to be attached to any particular factor will depend on the unique circumstances of each case." *Officers for Justice*, 688 F.2d at 625.

To determine whether a proposed settlement is "within the range of possible approval," the Court also ensures it is "not the product of fraud or overreaching by, or collusion between, the negotiating parties." *Officers for Justice*, 688 F.2d at 625; *see also Mego*, 213 F.3d at 458. Thus, to preliminarily assess the reasonableness of the parties' proposed settlement, the Court should review both the substance of the deal and the process used to arrive at the settlement. *See In re Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1080 ("preliminary approval . . . has both a procedural and substantive requirement").

This Settlement is well within the range of possible approval as a fair, reasonable, and adequate resolution between the parties, and should be preliminarily approved. All of the relevant

factors set forth by the Ninth Circuit for evaluating the fairness of a settlement at the final stage weigh in favor of preliminary approval now, and there can be no doubt that the Settlement was reached in a procedurally fair manner given Settlement Master Mueller's ongoing guidance and assistance. For these reasons, the Settlement merits preliminary approval.

C. The Settlement Is Substantively Fair Because It Provides Very Significant Benefits In Exchange For The Compromise Of Strong Claims

As noted in the summary of the Settlement terms above, the Settlement, and the related DOJ Consent Decree and FTC Order, compensate Class Members for the loss in market value of the Eligible Vehicles and for Volkswagen's misrepresentations about the environmental characteristics of the Eligible Vehicles; provide for the buyback and potential refit of the Eligible Vehicles to make them compliant with applicable environmental regulations; and result in the creation of a substantial fund for mitigation of the environmental harms caused by excess emissions from the Eligible Vehicles. This Settlement, rare among civil litigation resolutions, actually undoes harm, as well as compensating loss. The Settlement's significant benefits are provided in recognition of the strength of Plaintiffs' case on the merits and the likelihood that Plaintiffs would have been able to certify a litigation class, maintain certification through trial, and prevail. All PSC members, a uniquely experience group including preeminent class action litigators, consumer and environmental advocates, trial lawyers, and auto litigation veterans, support this Settlement, and it is highly uncertain whether the Class would be able to obtain and keep a better outcome through continued litigation, trial, and appeal. They certainly would not have been able to secure the commencement of the buyback, emissions modification, and remediation program as swiftly as it will take place under the Settlement. Moreover, while Class Counsel believe in the strength of this case, they recognize that there are always uncertainties in litigation, making compromise of claims in exchange for certain and timely provision to the Class of the significant benefits described herein an unquestionably reasonable outcome. *See Nobles*, 2009 U.S. Dist. LEXIS 59435, at *5 ("The risks and certainty of recovery in continued litigation are factors for the Court to balance in determining whether the Settlement is fair.") (citing *Mego*, 213 F.3d at 458; *Kim v. Space Pencil, Inc.*, No. C 11-03796 LB, 2012 WL 5948951, at *15 (N.D.

Cal. Nov. 28, 2012) ("The substantial and immediate relief provided to the Class under the Settlement weighs heavily in favor of its approval compared to the inherent risk of continued litigation, trial, and appeal, as well as the financial wherewithal of the defendant.")).

Indeed, should Class Counsel prosecute these claims against Volkswagen to conclusion, that recovery would come years in the future and at far greater expense to the environment and the Class. There is also a risk that a litigation Class would receive less or nothing at all, despite the compelling merit of its claims, not only because of the risks of litigation, but also because of the solvency risks such prolonged and expanding litigation would almost certainly impose upon Volkswagen. A judgment that bankrupts Volkswagen would be far less satisfying than a settlement that provides meaningful and certain monetary and restorative relief in the here and now. *See, e.g.*, *UAW v. GMC*, 497 F.3d 615, 632 (6th Cir. 2007) (affirming approval of settlement class and rejecting objections premised on prospect of plaintiffs complete victory on disputed issue because "any such victory would run the risk of being a Pyrrhic one . . . we need not embellish the point by raising the prospect of bankruptcy").

Moreover, in addition to the above, there is a risk that any class recovery obtained at trial would be reduced through offsets. Restitution remedies for automotive defects based on rescission or repurchase calculations are generally subject to offsets for the car owner's use of the vehicle. For example, under California law, the Song-Beverly Consumer Warranty Act provides for an offset calculated on the basis of the mileage driven. *See* Cal. Civ. Code § 1793.2(d)(2)(C); *see also Robbins v. Hyundai Motor America, Inc.*, 2015 WL 304142 at *6 (C.D. Cal. Jan. 14, 2015); *Rupay v. Volkswagen Group of America Inc.*, 2012 WL 10634428 at *4 (C.D. Cal. Nov. 15, 2012). State-law-required offsets could also apply to claims under the federal Magnuson Moss Warranty Act ("MMWA"), because while the MMWA effectively creates a federal cause of action to enforce state-law warranty claims, the MMWA applies state substantive law instead of creating substantively different federal warranty standards. *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) ("claims under the Magnuson–Moss Act stand or fall with . . . express and implied warranty claims under state law"); *Keegan v. Am. Honda Motor Co.*, 838 F. Supp. 2d 929, 954 (C.D. Cal. 2012). Indeed, the MMWA itself defines

the term "refund" as "refunding the actual purchase price (less reasonable depreciation based on actual use where permitted by rules of the Commission).

Further, California's Lemon Law specifically enumerates a method for calculating depreciation on vehicles in § 1793.2(d)(2)(C), while the National Traffic and Motor Vehicle Safety Act likewise notes that, following a safety recall, an available remedy to consumers is to "refund[] the purchase price, less a reasonable allowance for depreciation." 49 U.S.C. § 30120(a)(1)(A)(iii). Ultimately, any rescission or refund remedy requires that a plaintiff return the product in a comparable condition to what the plaintiff received. And because a vehicle's value depreciates significantly with use, courts require a reasonable reduction in the refund amount, to account for the depreciation and value provided to the plaintiff. *See, e.g.*, *Kruger v. Subaru of Am.*, 996 F. Supp. 451, 457 (E.D. Pa. 1998) ("Thus, because the car is unavailable and because the plaintiffs used the car for eight months, thereby depreciating its value, I conclude that the plaintiffs are not entitled to a full refund."); *Kruse v. Chevrolet Motor Div.*, Civil Action No. 96-1474, 1997 WL 408039, at *6 (E.D. Pa. July 15, 1997) ("Awarding damages equal to the full purchase price does not take into account the natural depreciation of the vehicle from normal usage."). Accordingly, the buyback calculation in the Settlement is both highly favorable to Class Members, and supported by applicable law. The settlement provides an array of provisions to compensate for the lost market value of the vehicles, and to restore their ongoing value and utility.

Avoiding years of additional litigation in exchange for the certainty of this Settlement now is also important because of the continued environmental damage being caused by the Eligible Vehicles. The Settlement will get the Eligible Vehicles off the road through a buyback or fix, reducing further environmental damage and air pollution. And the $2.7 billion allocated to NOx reduction programs effectively will reverse the environmental damage caused by the Eligible Vehicles' excess pollution.

Although the parties are unable to fully evaluate the reactions to the Settlement from Class Members prior to dissemination of the notice of settlement, based on preliminary discussions with Plaintiffs named in the Complaint as well as individuals who filed complaints consolidated in this

multidistrict litigation, the initial reaction has been overwhelmingly positive. Class Counsel are confident that other Class Members will have similarly positive reactions, especially given the real, immediate, and substantial relief the Settlement provides.

D. The Settlement Is The Product Of Good Faith, Informed, And Arm's-Length Negotiations, and It Is Procedurally Fair

Lead Counsel and the Class Counsel settlement working group engaged in settlement discussions with Volkswagen and government representatives from the EPA, CARB, and the FTC, under Settlement Master Mueller's guidance and supervision. Class Counsel also have analyzed huge volumes of discovery material that has provided them sufficient information to enter into a reasoned and well-informed settlement. *See, e.g.*, *Mego*, 213 F.3d at 459 (holding "significant investigation, discovery and research" supported "district court's conclusion that the Plaintiffs had sufficient information to make an informed decision about the Settlement").

Participation of government entities in the settlement process weighs highly in favor of granting preliminary approval. *See, e.g.*, *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977) ("The participation of a government agency serves to protect the interests of the class members, particularly absentees, and approval by the agency is an important factor for the court's consideration.") (citation omitted); *Jones v. Amalgamated Warbasse Houses, Inc.*, 97 F.R.D. 355, 360 (E.D.N.Y. 1982) ("That a government agency participated in successful compromise negotiations and endorsed their results is a factor weighing heavily in favor of settlement approval—at least where, as here, the agency is 'committed to the protection of the public interest.'") (citation omitted). So too does a settlement process involving protracted negotiations with the assistance of a court-appointed mediator. *See Pha v. Yang*, 2015 U.S. Dist. LEXIS 109074, at *13 (E.D. Cal. Aug. 17, 2015) (finding that the fact "the settlement was reached through an arms-length negotiation with the assistance of a mediator through a months-long process . . . weigh[ed] in favor of approval"); *Rosales v. El Rancho Farms*, No. 1:09-cv-00707-AWI-JLT, 2015 WL 446091, at *44 (E.D. Cal. July 21, 2015) ("Notably, the Ninth Circuit has determined the 'presence of a neutral mediator [is] a factor weighing in favor of a finding of non-collusiveness.'") (quoting *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th

Cir. 2011)); *Pierce v. Rosetta Stone, Ltd.*, No. C 11-01283 SBA, 2013 WL 5402120, at *15-16 (N.D. Cal. Sept. 26, 2013) (same).

Here, settlement negotiations were conducted in good faith, and the Settlement was reached at arms-length with the Court-appointed Settlement Master over the course of months of efforts by the parties. It is understatement to say that the parties benefited from the assistance of Settlement Master Mueller, who played a crucial role in supervising the negotiations and in helping the parties bridge their differences.

Most settlement negotiations take place along two dimensions: plaintiff versus defendant. These negotiations had at least four. The negotiations culminating in the related settlements now before the Court transpired along multiple dimensions simultaneously, with three government entities, and the Class, approaching the resolution sometimes alone sometimes together in various combinations with different stances at different times, all to hammer out the best possible resolution from each parties' perspective. While chaos was prevented by the direction of the Settlement Master and by this Court's repeated directive to move with dispatch, collusion was impossible.

Finally, Plaintiffs continue to vigorously prosecute non-settled claims against Volkswagen and other defendants in this litigation, including Volkswagen's corporate affiliate Porsche, Volkswagen's supplier Bosch, and others. This continued prosecution shows that issues in this case remain contested, and that the Settlement submitted for preliminary approval resulted from vigorous arm's-length negotiations.

Taken together, the substantive quality of the Settlement and the procedurally fair manner in which it was reached weigh in favor of granting preliminary approval here.

V. THE COURT SHOULD CERTIFY THE CLASS

Plaintiffs respectfully request that the Court certify the Class defined in paragraph 2.16 of the Class Action Agreement. Certification of the Class will allow notice of the Settlement to be issued so that Class Members can be informed of the existence and terms of the Settlement, their right to be heard on its fairness, their right to opt out, and the date, time and place of the fairness hearing. *Manual*, at §§ 21.632, 21.633. Rule 23 governs the issue of class certification, whether

the proposed class is a litigated class or, as here, a settlement class. However, when "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there will be no trial." *Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997).

Class certification is appropriate where: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Certification of a class seeking monetary compensation also requires a showing that "questions of law and fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). As demonstrated below, the Class readily satisfies each of these requirements, so certification is warranted.

A. The Class Meets The Requirements Of Rule 23(a)

1. The Class Is Sufficiently Numerous

Rule 23(a)(1) is satisfied when "the class is so numerous that joinder of all class members is impracticable." Fed. R. Civ. P. 23(a)(1). Numerosity is generally satisfied when the class exceeds forty members. *See, e.g., Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 654 (C.D. Cal. 2000). It is undisputed that 475,745 Eligible Vehicles were sold or leased in the U.S., and thus, that the Class consists of hundreds of thousands of members. The large size of the Class and the geographic dispersal of its members across the United States render joinder impracticable. Therefore, numerosity is easily established.

2. There Are Common Questions of Both Law and Fact

"Federal Rule of Civil Procedure 23(a)(2) conditions class certification on demonstrating that members of the proposed class share common 'questions of law or fact.'" *Stockwell v. City & County of San Francisco*, 749 F.3d 1107, 1111 (9th Cir. 2014). The "commonality requirement has been 'construed permissively,' and its requirements deemed 'minimal.'" *Estrella*

v. Freedom Fin'l Network, No. C 09-03156 SI, 2010 WL 2231790, at *25 (N.D. Cal. June 2, 2010) (quoting *Hanlon*, 150 F.3d at 1020). Indeed, the Supreme Court has held that to satisfy commonality, "'[e]ven a single [common] question' will do." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011). This is because "[w]hat matters to class certification . . . is not the raising of common questions -- even in droves -- but, rather, the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* at 350 (emphasis in original) (quotation marks and citations omitted). Thus, the putative class' "claims must depend upon a common contention . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 349.

Here, the claims of the Class all derive directly from Volkswagen's fraudulent scheme to mislead federal and state regulators into approving the Eligible Vehicles for sale or lease through the use of a Defeat Device designed to bypass emission standards and mask the dangerously high levels of pollutants being emitted during normal operating conditions, as well as Volkswagen' concurrent false and misleading marketing campaign that misrepresented and omitted the true nature of the Eligible Vehicles' "clean" diesel engine system. Volkswagen's common course of conduct raises common questions of law and fact, the resolution of which will generate common answers "apt to drive the resolution of the litigation" for the Class as a whole. *Dukes*, 564 U.S. at 350. And as Plaintiffs allege that their and the Class's "injuries derive from [D]efendants' alleged 'unitary course of conduct,'" they have "'identified a unifying thread that warrants class treatment.'" *Sykes v. Mel Harris & Assocs. LLC*, 285 F.R.D. 279, 290 (S.D.N.Y. 2012).

Even outside the settlement context, courts routinely find commonality where the class's claims arise from a defendant's uniform course of conduct. *See, e.g.*, *Negrete v. Allianz Life Ins. Co. of N. Am.*, 238 F.R.D. 482, 488 (C.D. Cal. 2006) ("The Court finds that the class members' claims derive from a common core of salient facts, and share many common legal issues. These factual and legal issues include the questions of whether Allianz entered into the alleged conspiracy and whether its actions violated the RICO statute. The commonality requirement of Rule 23(a)(2) is met."); *Cohen v. Trump*, 303 F.R.D. 376, 382 (S.D. Cal. 2014) ("Here, Plaintiff

argues his RICO claim raises common questions as to 'Trump's scheme and common course of conduct, which ensnared Plaintiff[] and the other Class Members alike.' The Court agrees."); *Spalding v. City of Oakland*, No. C11-2867 TEH, 2012 WL 994644, at *8 (N.D. Cal. Mar. 23, 2012) (commonality found where plaintiffs "allege[] a common course of conduct that is amenable to classwide resolution"); *International Molders' & Allied Workers' Local Union No. 164 v. Nelson*, 102 F.R.D. 457 (N.D. Cal. 1983) ("commonality requirement is satisfied where it is alleged that the defendants have acted in a uniform manner with respect to the class"); *see also Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014) (finding that "where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question").[4] Accordingly, Rule 23's commonality requirement is satisfied here.

3. The Settlement Class Representatives' Claims Are Typical of Other Class Members' Claims

"Rule 23(a)(3) requires that 'the claims or defenses of the representative parties are typical of the claims or defenses of the class.'" *Parsons v. Ryan*, 754 F.3d at 657, 685 (9th Cir. 2014) (quoting Fed. R. Civ. P. 23(a)(3)). "Like the commonality requirement, the typicality requirement is 'permissive' and requires only that the representative's claims are 'reasonably co-extensive with those of absent class members; they need not be substantially identical.'" *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (quoting *Hanlon*, 150 F.3d at 1020). "The test of typicality is 'whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" *Parsons*, 754 F.3d at 685 (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). Accordingly, "[t]he purpose

[4] Similarly, courts routinely find commonality in cases where uniform misrepresentations and omissions are employed to deceive the public. *See Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523, 537 (N.D. Cal. 2012) ("[C]ourts routinely find commonality in false advertising cases."); *Astiana v. Kashi Co.*, 291 F.R.D. 493, 501-02 (S.D. Cal. 2013) (same); *see also Guido v. L'Oreal, USA, Inc.*, 284 F.R.D. 468, 478 (C.D. Cal. 2012) (whether misrepresentations "are unlawful, deceptive, unfair, or misleading to reasonable consumers are the type of questions tailored to be answered in 'the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation'") (quoting *Dukes*, 131 S.Ct. at 2551).

of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Hanon*, 976 F.2d at 508. Thus, where a plaintiff suffered a similar injury and other class members were injured by the same course of conduct, typicality is satisfied. *See Parsons*, 754 F.3d at 685.

Here, the same course of conduct that injured the Settlement Class Representatives also injured other Class Members. The Settlement Class Representatives, like other Class Members, were the victims of Volkswagen' fraudulent scheme because they purchased or leased an Eligible Vehicle, each of which contained an illegal Defeat Device and produced unlawful levels of NO_X emissions. The Settlement Class Representatives, like other Class Members, would not have purchased or leased their vehicles had Volkswagen disclosed to government regulators the illegal Defeat Devices and the true nature of the Eligible Vehicles' "clean" diesel engine systems, because without Volkswagen's wrongdoing, the Eligible Vehicles would not have been approved for sale or lease in the U.S. The Settlement Class Representatives and the other Class Members will similarly benefit from the relief provided by the Settlement. Accordingly, Rule 23's typicality requirement is satisfied here.

4. The Settlement Class Representatives and Class Counsel Will Fairly and Adequately Protect the Interests of the Settlement Class

Finally, Rule 23(a)(4) requires "the representative parties [to] adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "To determine whether the adequacy of representation requirement of Rule 23(a)(4) is satisfied, two questions must be asked '(1) Do the representative plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?'" *Clemens v. Hair Club for Men, LLC*, No. C 15-01431 WHA, 2016 WL 1461944, at *6 (N.D. Cal. Apr. 14, 2016) (quoting *Staton*, 327 F.3d at 957). As discussed below, the answer to each of those questions is a resounding "yes."

a. The Interests of the Settlement Class Representatives Are Directly Aligned with those of the Absent Class Members and the Settlement Class Representatives Have Diligently Pursued the Action on Their Behalf

Plaintiffs do not have any interests antagonistic to the other Class Members and will continue to vigorously protect their interests. *See Clemens*, 2016 U.S. Dist. LEXIS 50573, at *6. The Settlement Class Representatives and Class Members are entirely aligned in their interest in proving that Volkswagen misled them and share the common goal of obtaining redress for their injuries.

The Settlement Class Representatives understand their duties as class representatives, have agreed to consider the interests of absent Class Members, and have actively participated in this litigation. For example, the Settlement Class Representatives have provided their counsel with factual information pertaining to their purchase or lease of an Eligible Vehicle to assist in drafting the Complaint. Furthermore, all representative Plaintiffs were clearly advised of their obligations as class representatives and demonstrated their understanding of those obligations by completing and returning detailed verified Plaintiff Fact Sheets during discovery in this litigation. Plaintiffs also have searched for, and provided, relevant documents and information to their counsel, and have assisted in preparing discovery responses and completing comprehensive fact sheets. Moreover, Plaintiffs have regularly communicated with their counsel regarding various issues pertaining to this case, and they will continue to do so until the Settlement is approved and its administration completed. All of this together is more than sufficient to meet the adequacy requirement of Rule 23(a)(4). *See Trosper v. Styker Corp.*, No. 13-CV-0607-LHK, 2014 WL 4145448, at *43 (N.D. Cal. Aug. 21, 2014) ("All that is necessary is a rudimentary understanding of the present action and . . . a demonstrated willingness to assist counsel in the prosecution of the litigation.").

b. Class Counsel Are Qualified To Serve as Settlement Class Counsel

Class Counsel have already demonstrated their qualifications to the Court. Lead Counsel and each member of the PSC participated in perhaps the most competitive application process in

an MDL ever, during which they described to the Court their qualifications, experience, and commitment to this litigation. The criteria the Court established and considered in appointing Class Counsel are substantially similar to the considerations set forth in Rule 23(g) governing the appointment of class counsel. *Compare* Dkt. 336 and 1084, *with Clemens*, 2016 U.S. Dist. LEXIS 50573, at *6. Class Counsel are highly qualified lawyers who have experience in successfully prosecuting high-stakes complex cases and consumer class actions. Further, Class Counsel, and their respective law firms, have already undertaken an enormous amount of work, effort and expense in this litigation and have demonstrated their willingness to devote whatever resources are necessary to see this case through to an historic and successful outcome. *See, e.g.*, May 24, 2016, Status Conference Hr'g Tr. 8:6-14 (Dkt. 1535) ("Finally, the Court must note that, while it has not and will not make a judgment on the proposed settlements until the appropriate time, it is grateful for the enormous effort of all parties, including the governmental agencies – their efforts to obtain a global resolution of the issues raised by these cases. I have been advised by the Settlement Master that all of you have devoted substantial efforts, weekends, nights, and days, and perhaps at sacrifice to your family."). Here, the Court need look no further than the significant benefits already obtained for the Class through Class Counsel's zealous and efficient prosecution of this action. Accordingly, the Court should find that Class Counsel are adequate.

B. The Requirements Of Rule 23(b)(3) Are Met

In addition to the requirements of Rule 23(a), the Court must find that the provisions of Rule 23(b) are satisfied. The Court should certify a Rule 23(b)(3) class when: (i) "questions of law or fact common to class members predominate over any questions affecting only individual members"; and (ii) a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). This case satisfies both the predominance and superiority requirements.

1. Common Issues of Law and Fact Predominate

"The predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual

issues.'" *Tyson Foods, Inc. v. Bouaphakeo*, __U.S.__, 136 S. Ct. 1036 (2016) (quoting 2 W. Rubenstein, *Newberg on Class Actions* §4:49 at 195-96 (5th ed. 2012)). "When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'" *Id.* (quoting 7AA C. Wright, A. Miller, & M. Kane, Federal Practice & Procedure §1778, at 123-24 (3d ed. 2005)). Instead, at its core, "[p]redominance is a question of efficiency." *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7th Cir. 2012). Thus, "[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1022 (internal quotations and citations omitted). Accordingly, it is appropriate to certify a single nationwide class of consumers from all fifty States here.

The Rule 23(b)(3) predominance inquiry in the context of the certification of a nationwide settlement class involving various state consumer protection law claims was the subject of an extensive *en banc* decision by the Third Circuit in *Sullivan v. DB Invs., Inc.*, 667 F.3d 273 (3d Cir. 2011), *cert denied sub nom., Murray v. Sullivan*, 132 S. Ct. 1876 (2012). In affirming certification a nationwide settlement class, the Third Circuit's predominance inquiry was informed by "three guideposts": "first, that commonality is informed by the defendant's conduct as to all class members and any resulting injuries common to all class members; second, that variations in state law do not necessarily defeat predominance; and third, that concerns regarding variations in state law largely dissipate when a court is considering the certification of a settlement class." *Sullivan*, 667 F.3d at 297. Here, like in *Sullivan*, any material variations in state law do not preclude a finding of predominance given the uniformity of Volkswagen's conduct and the resulting injuries that are common to all Class Members.

Indeed, this Court has adopted the rationale in *Sullivan* that "state law variations are largely 'irrelevant to certification of a settlement class.'" *Id.* at 304 (quoting *Sullivan*, 667 F.3d at 304) (citation omitted). *See Wakefield v. Wells Fargo & Co.*, No. C 12-05053 LB, 2014 WL

7240339, at *12-13 (N.D. Cal. Dec. 18, 2014); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944-SC, 2016 U.S. Dist. LEXIS 9944, at *208-09 (N.D. Cal. Jan. 6, 2016), *report and recommendation adopted*, 2016 U.S. Dist. LEXIS 9766 (N.D. Cal. Jan. 26, 2016). Moreover, this Court has agreed that in the settlement context, the Court need not "differentiate[e] within a class based on the strength or weakness of the theories of recovery." *In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. C 07-05634 CRB, 2015 WL 3396829, at *20 (N.D. Cal. May 26, 2015) (quoting *Sullivan*, 667 F.3d at 328); *Rodman v. Safeway, Inc.*, No. 11-cv-03003-JST, 2014 WL 988992, at *54-56 (N.D. Cal. Mar. 9, 2014) (citing *Sullivan*, 667 F.3d at 304-07).

Here, questions of law or fact common to Class Members predominate over any questions affecting only individual members. Volkswagen's uniform scheme to mislead regulators and consumers by submitting false applications for COCs and EOs, failing to disclose the existence of the illegal Defeat Devices in the Eligible Vehicles, and misrepresenting the levels of NO_X emissions of the Eligible Vehicles are central to the claims asserted in the Complaint. Indeed, the evidence necessary to establish that Volkswagen engaged in a scheme to design, manufacture, market, sell, and lease the Eligible Vehicles with Defeat Devices is common to all Class Members, as is the evidence of the false and misleading statements that Volkswagen used to mass market the Eligible Vehicles.

The Ninth Circuit favors class treatment of fraud claims stemming from a "common course of conduct," like the scheme that is alleged by Plaintiffs here. *See In re First Alliance Mortg. Co.*, 471 F.3d 977, 990 (9th Cir. 2006); *Hanlon*, 150 F.3d at 1022-1023.. And, even outside of the settlement context, predominance is readily met in cases asserting RICO and consumer claims arising from a single fraudulent scheme by a defendant that injured each plaintiff. *See Amchem Prods.*, 521 U.S. at 625; *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1173, 1176 (9th Cir. 2010) (consumer claims based on uniform omissions are readily certifiable where the claims are "susceptible to proof by generalized evidence," even if individualized issues remain); *Friedman v. 24 Hour Fitness USA, Inc.*, No. CV 06-6282 AHM (CTx), 2009 WL 2711956, at *22-23 (C.D. Cal. Aug. 25, 2009) ("Common issues frequently predominate in RICO actions that allege injury as a result of a single fraudulent scheme."); *see*

also Klay v. Humana, Inc., 382 F.3d 1241, 1256, 1257 (11th Cir. 2004) (upholding class certification of RICO claim where "all of the defendants operate nationwide and allegedly conspired to underpay doctors across the nation, so the numerous factual issues relating to the conspiracy are common to all plaintiffs . . . [and the] "corporate policies [at issue] . . . constitute[d] the very heart of the plaintiffs' RICO claims"). Thus, Plaintiffs have satisfied the predominance requirement.

2. Class Treatment Is Superior in This Case

Finally, Rule 23(b)(3) requires a class action to be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). This factor "requires determination of whether the objectives of the particular class action procedure will be achieved in the particular case." *Hanlon*, 150 F.3d at 1023. Under the Rule, "the Court evaluates whether a class action is a superior method of adjudicating plaintiff's claims by evaluating four factors: '(1) the interest of each class member in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against the class; (3) the desirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action.'" *Trosper*, 2014 U.S. Dist. LEXIS 117453, at *62 (quoting *Leuthold v. Destination Am., Inc.*, 224 F.R.D. 462, 469 (N.D. Cal. 2004)).

There can be little doubt that class treatment is superior to the litigation of hundreds or thousands of individual consumer actions here. "From either a judicial or litigant viewpoint, there is no advantage in individual members controlling the prosecution of separate actions. There would be less litigation or settlement leverage, significantly reduced resources and no greater prospect for recovery." *Hanlon*, 150 F.3d at 1023; *see also Wolin*, 617 F.3d at 1176 ("Forcing individual vehicle owners to litigate their cases, particularly where common issues predominate for the proposed class, is an inferior method of adjudication."). The damages sought by each class member here, while representing an important purchase to class members, are not so large as to weigh against certification of a class action. *See Smith v. Cardinal Logistics Mgmt. Corp.*, No. 07-2104 SC, 2008 WL 4156364, at *32-33 (N.D. Cal. Sept. 5, 2008) (finding that class

members had a small interest in personally controlling the litigation even where the average amount of damages were $25,000-$30,000 per year of work for each class member); *see also Walker v. Life Ins. Co. of the Sw.*, No. CV 10-9198 JVS (RNBx), 2012 WL 7170602, at *49 (C.D. Cal. Nov. 9, 2012). The sheer number of separate trials that would otherwise be required also weighs in favor of certification. *Id.*

Moreover, all private federal actions seeking relief for the Class have already been transferred to this District for consolidated MDL pretrial proceedings.[5] Dkt. 950. That the Judicial Panel on Multidistrict Litigation consolidated all related consumer cases in an MDL before this Court is a clear indication that a single proceeding is preferable to a multiplicity of individual lawsuits. The government suits are here too, enabling this Court to approve and enforce all of the provisions of each of these settlements. The certification of the Settlement Class enables and completes this advantageous unified jurisdiction.

Additionally, the Class is defined by objective, transactional facts—the purchase or lease of an Eligible Vehicle—and there is no dispute that Class Members can easily be identified by reference to the books and records of the Volkswagen and their dealers. Accordingly, the Class is plainly ascertainable. *See Moreno v. Autozone, Inc.*, 251 F.R.D. 417, 421 (N.D. Cal. 2008) (Breyer, J.) ("A class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description.").

Because the class action device provides the superior means to effectively and efficiently resolve this controversy, and as the other requirements of Rule 23 are each satisfied, certification of the Class is appropriate.

[5] Although several class actions are pending in various state courts, the existence of these actions does not defeat a finding of superiority. *See Cartwright v. Viking Indus.*, No. 2:07-CV-02159-FCD-EFB, 2009 WL 2982887, at *44-*50 (E.D. Cal. Sept. 14, 2009) (certifying CLRA, UCL, fraudulent concealment, unjust enrichment, and warranty claims despite a concurrent state court class action that certified warranty claims for class treatment); *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 527 F. Supp. 2d 1053, 1069 (N.D. Cal. 2007) (recognizing that courts often certify concurrent FLSA and UCL class actions). Nor does the existence of actions filed by the DOJ or FTC preclude a finding of superiority here, as both of those actions are part of the MDL and the proposed Settlement was negotiated with the participation of those government entities.

VI. THE PROPOSED NOTICE PROGRAM PROVIDES THE BEST PRACTICABLE NOTICE IN PLAIN LANGUAGE, BY DIRECT MAIL AND EXTENSIVE PULICATION

Upon certifying a Rule 23(b)(3) class, Rule 23(c)(2)(B) requires the Court to "direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." The best practicable notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to object." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In addition, Rule 23(e)(1) requires that before a proposed settlement may be approved, the Court "must direct notice in a reasonable manner to all class members who would be bound by the proposal." In class action settlements, it is common practice to provide a single notice that satisfies both of these notice standards. *Manual*, at § 21.633. Combined notice helps to avoid confusion that separate notifications of certification and settlement may produce. "Notice is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and come forward and be heard.'" *Churchill Vill., L.L.C., v. GE*, 361 F.3d 566, 575 (9th Cir. 2004) (quoting *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.3d 1338, 1352 (9th Cir. 1980)).

The proposed notice program meets these standards. *See* Exhibit 2, Declaration of Shannon Wheatman on Adequacy of the Class Notice Program ("Wheatman Decl."). It consists of, among other things, a Short and Long Form Notice, in addition to a comprehensive Settlement Website (www.VWCourtSettlement.com), that are clear and complete, and that meet all the requirements of Rule 23.

The Long Form Notice is a 30-plus page document that includes a thorough series of questions and answers designed to explain the Settlement in clear terms in a well-organized and reader-friendly format. Among other things, it includes an overview of the litigation, an explanation of the benefits available under the Settlement, and detailed instructions on how to participate in or opt out of the Settlement. The proposed Long Form Notice is attached to the Class Action Agreement as Exhibit 3.

The Short Form Notice, though less comprehensive than the Long Form Notice, also conveys the basic structure of the Settlement and is designed to capture Class Members' attention in newspapers and periodicals with clear, concise, plain language. It directs readers to the Settlement Website (where the Long Form Notice is available) or a toll-free number for more information. The Short Form Notice is attached to the Class Action Agreement as Exhibit 2.

Together, these notices cover all of the elements outlined in Rule 23(c)(2)(B), specifically:

- A description of the nature of the case. *See* Long Form Notice Summary and Question 10;
- The Class definition. *See* Long Form Notice Question 9;
- A description of the class claims, potential outcomes, and the reasons for the Settlement. *See* Long Form Notice Summary and Questions 44-46;
- A statement concerning the Class Members' rights to recovery. *See* Long Form Notice Summary and Questions 1, 18-41;
- The names of representatives for Class Counsel who can answer Class Members' questions. *See* Long Form Notice Question 51;
- The process and procedure for objecting to the Settlement, and appearing at a final fairness hearing, with or without the aid of an attorney. *See* Long Form Notice at Questions 54-58;
- The process and procedure through which a Class Member may opt out of the Settlement. *See* Long Form Notice Summary and Question 48; and
- The fact that the final judgment in this case will release all claims against the Volkswagen and bind all Class Members. *See* Long Form Notice Summary and Question 47.

The proposed method of disseminating this notice is the best practicable method under the circumstances, and includes individual notice to the Class Members who can be identified through reasonable effort. In sum, the proposed notice distribution plan consists of various parts, including: (1) individual direct mail notice: (2) paid media; (3) earned media and outreach; and (4) a Settlement Website and toll-free phone number. Wheatman Decl. ¶¶ 18-42.

The principal method of reaching Class Members will be through individual direct mail notice. This is the quintessential objectively defined and readily identifiable class. *See Manual for Complex Litigation (Fourth)* (2004), § 21.222. A cover letter and copy of the Long Form Notice can and will be sent to the vast majority of Class Members, who are readily identifiable through Volkswagen's records and/or registration data, such as Polk data. All mailings will be sent via First Class U.S. Mail, and all addresses will be checked against national databases prior to being sent. Direct notice will also be mailed and/or emailed to Class Members when the EPA and CARB approve or reject Volkswagen's proposed emissions modifications.

A robust media campaign focused on stimulating awareness and involvement will supplement the direct mail notice. The Short Form Notice will appear as a two-color advertisement in various newspapers, including the *The New York Times*, *The Wall Street Journal*, *USA Today*, and other newspapers and magazines, as outlined in the Wheatman Declaration and accompanying attachments. The paid media campaign will also include, among other things, various methods of disseminating online banner advertisements, social media advertising, and sponsored keyword advertisements on major search engines. An earned media program—described further in the Wheatman Declaration—also will be implemented to amplify the paid media and provide additional notice to Class Members. Finally, the Notice Program includes a toll-free telephone number as well as a Settlement Website, which contains background information on the case, the Long Form Notice, the Claim Form and other information that Class Members may find useful and relevant to their claims decisions. An initial launch of the website will coincide with the filing of the Class Action Agreement, and if the Settlement is preliminarily approved, at that time, the website will be updated and enhanced to, among other things, allow class members to register, receive Buyback and Approved Emissions Modification offers from Volkswagen, and to file claims.

The Parties created this comprehensive proposed notice program—including both the content and the distribution plan—with Kinsella Media, LLC ("KM"), an advertising and legal notification firm in Washington, D.C. that specializes in the design and implementation of notification in complex litigation and has been appointed as notice expert and notice administrator

in scores of major class actions. Subject to the Court's approval, the parties have selected KM to serve as the Notice Administrator. The Parties are confident that the Notice Program meets the applicable legal standards and will provide the best notice practicable under the circumstances.

VII. THE PROPOSED FINAL APPROVAL HEARING SCHEDULE

The last step in the settlement approval process is the final approval hearing, at which the Court may hear any evidence and argument necessary to evaluate the Settlement. At that hearing, proponents of the Settlement may explain and describe its terms and conditions and offer argument in support of settlement approval, and Class Members, or their counsel, may be heard in support of or in opposition to the Settlement. Plaintiffs propose the following schedule for final approval of the Settlement and implementation of the Settlement Program:

Date	Event
June 28, 2016	Settlement Class Representatives file Motion for Preliminary Approval of Settlement
June 30, 2016	Status Conference with the Court
July 5, 2016	Volkswagen provides Class Action Fairness Act Notice to State Attorneys General
July 26, 2016	Preliminary Approval Hearing [Remainder of schedule assumes entry of Preliminary Approval Order on this date]
July 27, 2016	Class Notice Program begins
August 19, 2016	Class Notice Program ends
August 26, 2016	Motion for Final Approval filed
September 16, 2016	Objection and Opt-Out Deadline
September 16, 2016	End of Eligible Seller Identification Period
September 29, 2016	Deadline for State Attorneys General to file Comments/Objections to this Class Action Agreement
September 30, 2016	Reply Memorandum in Support of Final Approval filed

October 3, 2016 – October 7, 2016 (Specific date TBD by Court)	Final Approval Hearing. While the timing and outcome of every determination is at the Court's discretion, the Parties to this Class Action Agreement request and anticipate that the Court would enter the DOJ Consent Decree and FTC Consent Order at the same time as the Final Approval Order. The Buyback and Lease Termination program under this Class Action Agreement will begin expeditiously upon Final Approval and entry of the DOJ Consent Decree. To the extent available, the Approved Emissions Modification Option under this Class Action Agreement will begin at the same time.

VIII. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court preliminarily approve the Settlement, provisionally certify the Class, conditionally appoint the undersigned as Settlement Class Counsel and the Plaintiffs listed in Exhibit 1 hereto as the Settlement Class Representatives, order dissemination of notice to Class Members; and set a date for the final approval hearing.

Dated: June 28, 2016

Respectfully submitted,

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

By: */s/ Elizabeth J. Cabraser*

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Plaintiffs' Steering Committee

CERTIFICATE OF SERVICE

I hereby certify that, on June 28, 2016, service of this document was accomplished pursuant to the Court's electronic filing procedures by filing this document through the ECF system.

/s/ *Elizabeth J. Cabraser*
Elizabeth J. Cabraser